DISTRIBUTED
MAR 28 1991

ORIGINAL

No. 90-6704 (5)

Supreme Court, U.S.
FILED
MAR 28 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON **PETITION FOR A WRIT OF CERTIORARI**
TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

BERNARD J. O'DONNELL
Counsel of Record

BRIAN J. BARTLEY
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, DE 19801
Tel.: (302) 577-3230

Attorneys for Petitioner

RECEIVED
MAR 28 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

22 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT

A STATE MAY NOT USE EVIDENCE OF A CAPITAL DEFENDANT'S CONSTITUTIONALY PROTECTED BELIEFS AND ASSOCIATIONS AS AN AGGRAVATING CIRCUMSTANCE IN A PENALTY HEARING.

1. Delaware's Capital Sentencing Statute 2

2. Role of Aggravating "Character" Evidence At A Penalty Hearing 3

3. Dawson's Membership in a "White Racist Prison Gang" Was Not Relevant "Character" Evidence 8

4. The State's Introduction of the Aryan Brotherhood Evidence Clearly Contravened the First Amendment 12

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Barclay v. Florida, 463 U.S. 939 (1983) 14, 16, 17

Brown v. Board of Education, 347 U.S. 483 (1954) 16

California v. Brown, 479 U.S. 538 (1987) 17

Collin v. Smith, 578 F.2d 1197 (7 Cir. 1978) 12, 13

Dawson v. State, 581 A.2d 1078 (Del. 1990) 2, 3

Flamer v. State, 490 A.2d 104 (Del. 1983) 2, 3

Franklin v. Lynaugh, 487 U.S. 164 (1988) 5, 7, 8, 9

Furman v. Georgia, 408 U.S. 238 (1972) 13, 16

Gebhart v. Belton, 91 A.2d 137 (Del. 1952) 15

Lockett v. Ohio, 438 U.S. 586 (1978) 4

McKoy v. North Carolina, 108 L. Ed 2d 369 (1990) 4

Riley v. State, 492 A.2d 997 (Del. 1985) 3

Texas v. Brown, 105 L.Ed.2d 342 (1989) 14

United State v. Abel, 469 U.S. 45 (1984) 6

United State v. Bakker, 4th Cir., No. 89-5687, 2/11/91, ___ LW ___, 48 Cr.L. 1472 10

United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983) . . . 6, 16

Whalen v. State, 492 A.2d 552 (Del. 1985) 2

Woodson v. North Carolina, 428 U.S. 304 (1976) 5

Zant v. Stephens, 462 U.S. 862 (1983) . . . . . passim

UNITED STATES CONSTITUTION

First Amendment . . . . . passim

Eight Amendment . . . . . passim

Fourteenth Amendment . . . . . passim

STATUTES

11 Del. C. § 4209 6

OTHER AUTHORITIES

Oliver Wendell Holmes, The Common Law, 1881 11

No. 90-6704

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

ON **PETITION FOR A WRIT OF CERTIORARI**
TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Several general observations should preliminarily be made on the petitioner's behalf prior to directly addressing Delaware's legal arguments in its brief in opposition. First, the trial court did not provide any explanatory instruction as to any limiting consideration the jury should give to the evidence of the defendant's beliefs or membership in the Aryan Brotherhood. Second, the Supreme Court of Delaware found that the evidence concerning the defendant's beliefs in and membership in the Aryan Brotherhood were admissible evidence of the defendant's character in the death penalty proceeding. Res. Br. at 12. Third, under these circumstances, the Court did not find that the First Amendment barred the use of these views at the petitioner's death penalty hearing.

1. Delaware's Capital Sentencing Statute

In its brief in opposition, the State of Delaware argues that, under its death penalty statute, a defendant is "presumptively subject to the sentence of death" whenever at least one of the statutory aggravating circumstances has been established, Resp. Br. at 17.

Delaware does not have a "presumptive" death penalty statute. Delaware's statute vests the jury with the widest discretion in their decision concerning imposing a sentence of death. The statute is not a "weighing" statute because the jury is not told how to weigh and consider aggravating and mitigating circumstances. Flamer v. State, Del. Supr., 490 A.2d 104, 135 (1983) (citing Zant v. Stephens, 462 U.S. 862 (1983)). The trial court must convey in its instructions to the jury that they still may recommend against the death penalty no matter what aggravating circumstances are found to exist. Dawson v. State, Del. Supr., 581 A.2d 1078, 1104-05 (1990); Whalen v. State, Del. Supr., 492 A.2d 552, 560-62 (1985).

Moreover, besides constitutional limitations which might prevail against any "presumptive" death penalty statute, common sense ordains that there cannot be any "factual" presumption that the death penalty will be imposed in Delaware because juries have in fact declined to imposed the death penalty in about 85% of the cases since 1977 where a death penalty hearing premised on at least

one statutory aggravating circumstance has been conducted.[1]

Consequently, the role of the non-statutory aggravating circumstance in question would have more significance to the jury's discretionary decision that death should be imposed, not less significance as Delaware apparently suggests by its misleading argument about Delaware's "presumptive" death penalty.

2. Role of Aggravating "Character" Evidence At A Penalty Hearing

Delaware's Attorney General basically contends that the scope of relevant character evidence is unfettered with respect to protected expression when used by the State as a non-statutory aggravating circumstance at the discretionary stage of a capital sentencing proceeding. Specifically, Delaware argues that there is not "a narrower test of relevancy when the evidence is being proffered by the prosecution as an 'aggravating factor' rather than by the defendant in 'mitigation.'" Resp. Br. at 19. It offers no applicable precedential authority for this unconventional argument.

In fact, this argument was augured in Lockett where this Court expressed the view that:

> ...the Eighth and Fourteenth Amendments require that the sentencer....not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

---

[1] In the petitioner's case, the Delaware Supreme Court found that Dawson was one of only three first degree murder defendants of the twenty six who have gone to a penalty hearing since 1985 upon whom the jury imposed the death sentence. Dawson v. State, Del. Supr., 581 A.2d 1078, 1109-11 (1990) (A-69-71). See also, Riley v. State, Del. Supr., 496 A.2d 997, 1026-1028 (1985); Flamer v. State, Del. Supr., 490 A.2d 104, 138-144 (1983).

Lockett v. Ohio, 438 U.S. 586, 604 (1978). (emphasis in original). In arriving at this broad ruling, ("any aspect of a defendant's character"), governing only mitigating evidence, the Court limited the admission of general character evidence to that: 1) proffered by a defendant, 2) as a mitigating factor, 3) in support of a penalty less than death. In contrast, the general "character" evidence offered by the State below concerning the petitioner's Aryan Brotherhood membership was: 1) proffered by the prosecution, 2) as an aggravating circumstance, 3) in support of the death penalty.

Delaware has chosen to ignore this Court's repeated caveat that:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence.

McKoy v. North Carolina, 494 U.S. ___; 108 L. Ed 2d 369; 110 S. Ct.___ (1990). (citations omitted).

The petitioner, of course, agrees with Delaware that a state's introduction of relevant aggravating character evidence, although not denominated as a statutory aggravating factor, at a penalty hearing does not violate the Eighth Amendment. Zant v. Stephens, 462 U.S. 862 (1983). Res. Br. at 19. For example, in the case below, the petitioner's criminal record and correctional record, although non-statutory aggravating evidence, were properly introduced as character evidence by the State of Delaware at his penalty hearing without defense objection. This court recognizes

such evidence as relevant evidence of the defendant's character. Franklin v. Lynaugh, 487 U.S. 164, 178 (1988) ("...the jury was surely free to weigh and evaluate petitioner's disciplinary record as it bore on his 'character' -that is, his 'character' as measured by his likely future behavior."). What the petitioner vigorously disputes is Delaware's dangerous proposition that it may introduce any general "character" evidence at a penalty hearing which is legally irrelevant to the issue of whether a human being should be executed.

Ironically, the State of Delaware's logic and its application of prior decisions of this Court are so contorted that the State essentially argues that the "fundamental respect for humanity underlying the Eighth Amendment" requires that the State be permitted to use evidence of belief ordinarily protected by the First Amendment to argue to a jury that the holder of such a belief does not deserve to live. Res. Br. at 19 (citing Woodson v. North Carolina, 428 U.S. 304 (1976)). Only the petitioner had any Eighth Amendment right at stake, however. The Eighth Amendment, like the First Amendment, serves exclusively to curb governmental conduct. Therefore, under no circumstances can the "fundamental respect for humanity underlying the Eighth Amendment," which Delaware disingenuously espouses, authorize the punishment of a capital defendant for beliefs or associations protected by the First Amendment.

Delaware also argues that evidence of the petitioner's belief or membership in the Aryan Brotherhood was relevant because "its

value [wa]s to negate the existence of circumstances that otherwise might plausibly be offered as mitigating factors." Resp. Br. at 19. (emphasis added). This argument suggests that the prosecution was required to anticipate through mere speculation what mitigating factors the defense might introduce. This was not the case. Delaware law required the petitioner to give written notice to the State of the mitigating factors he would offer prior to the commencement of the penalty hearing. 11 Del. C. 4209(c).

The State also argues that any evidence is "relevant" at this stage if it is used to "negate" the existence of mitigating evidence. Res. Br. at 19. Obviously, the State avoids using the legal term "rebut" in the context of this argument because use of that term implies that such evidence must be legally and logically relevant as a threshold consideration. On the other hand, to "negate" a mitigating case tending to prove that a defendant is less deserving of death, requires only the presentation of any evidence which might cause the jury to dislike the defendant because the evidence is "negative". Neither the Eighth nor the First Amendments permit a negative, "we don't like him" test which the State of Delaware would have this Court accept in order to determine whether such "negative" evidence is relevant to a defendant's character in a death penalty hearing. United States v. Abel, 469 U.S. 45 (1984); United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983). Because Delaware cannot legitimately explain how any of the mitigating factors identified by the petitioner prior to the penalty hearing could have been logically rebutted by the

petitioner's Aryan Brotherhood beliefs or membership in the correct legal sense of the term "rebut", Delaware's argument in this regard must be rejected as pretextual or revisionist at best.

The State of Delaware also mentions several features of its death penalty law which reflect the very wide-range of discretion vested in capital sentencing juries. For instance, the jury has the power to grant mercy and can decline in its "unconstrained and absolute" discretion to impose the death penalty regardless of the circumstances. Resp. Br. at 17-18, n.6. Furthermore, "under the Delaware statute, the sentencing jury is not given any instructions about the weight of any 'aggravating' and 'mitigating' circumstances or how to perform the 'weighing' process." Id. Inherent in such a wide range of sentencing discretion is the likelihood that the discretion exercised by a defendant's jury will be improperly influenced by the introduction of evidence which is irrelevant to the capital sentencing process, and that the jury's decision to impose the death sentence will be arbitrary and in violation of the Eighth and Fourteenth Amendments.

Notwithstanding Delaware's incredulous argument, unsupported by any direct authority, concerning the nearly unfettered discretion accorded to a jury under its death penalty statute, this Court has observed on numerous occasions that:

> Our cases before and since have similarly suggested that "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses" and that the "Constitution ... requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) (citing California v. Brown, 479 U.S 538,

541 (1987).

If sentencers may not be given unbridled discretion under the Eighth amendment in their decision to impose the punishment of death, to the extent that discretion must be limited, it cannot be applied in order to punish constitutionally protected expression.

3. Dawson's Membership in a "White Racist Prison" Gang Was Not Relevant "Character" Evidence.

Although Delaware admits that this Court has never defined character evidence in the manner in which it would now have it defined, Res. Br. at 20, every case which Delaware offers as authority for its argument is a mitigation case which permits a wide range of character evidence as mitigation to be submitted to the jury on a defendant's behalf. Moreover, in Franklin v. Lynaugh, a very recent mitigation case relied upon by the State of Delaware, it was observed that,

> this Court has gone far in establishing a constitutional entitlement of capital defendants to appeal for leniency in the exercise of the juries' sentencing discretion. [citations omitted] But even in so doing, this Court has never held that jury discretion must be unlimited or unguided.

Franklin v. Lynaugh, 487 U.S. 164 (1988) (plurality opinion).

Using Franklin, id., a mitigation case, Delaware argues that Dawson's membership in the Aryan Brotherhood was relevant character evidence for capital sentencing purposes because it told the jury "something" about Dawson's personality. Resp Br. at 20-21. ("the catchwords 'character' and 'background' are now taken to encompass any evidence which 'tells the sentencer something about the

defendant's personality.'")[2] Any evidence perhaps indicative of a person's personality or background, however, need not be admissible "character" evidence. But to be relevant and admissible, character evidence proffered by the prosecution cannot merely tell the sentencer something about the defendant: it must be probative on the question of whether this defendant should die. For example, regular church attendance is mentioned as a type of mitigating "character" evidence in Franklin v. Lynaugh, id. at 190. If the State's dialectical premise is valid, that "it must be 'relevant' for the sentencing jury to hear evidence, offered by the prosecution, that the defendant lacks counter-balancing redeeming qualities," Res. Br. at 21, then it would be relevant for the State to offer evidence that the defendant does not attend church or does not believe in God in order to counterbalance any mitigating evidence which would make it less likely that the jury would impose death.[3] Any such evidence, despite Delaware's nearly boundless view of what character evidence would be "consistent with [a defendant's] evil character," Res. Br. at 21, has never conformed to constitutional requirements, however. As one court

---

[2] citing the dissenting opinion of Justice Stevens in Franklin v. Lynaugh,487 U.S. 164, 190 (1988) (plurality opinion).

[3] The petitioner raised this point previously, cert. pet. at 21, and Delaware did nothing to disavow it in its brief in opposition. Obviously, the State of Delaware may believe, consistent with its "anything goes" analysis with respect to the admission of character evidence at a death penalty hearing, that they may both argue and offer evidence of a defendant's lack of "counter-balancing redeeming" religious beliefs of even peculiar religious beliefs which do not have the approval of a "broad community consensus." Res. Br. at 28.

most recently observed:

> Sentencing discretion, however, must be exercised within the boundaries of due process ... Courts have held that sentences imposed on the basis of impermissible considerations, such as a defendant's race or national origin, violate due process ... While these cases focused on a defendant's characteristics, we believe that similar principles apply when a judge impermissibly takes on his own religious characteristics into account in sentencing.

United States v. Bakker, 4th Cir., No. 89-5687, 2/11/91, ___ LW ___, 48 CrL 1472.

The State portrayed the petitioner as being of "evil character" to have the jury dislike him as a result of holding beliefs protected by the First Amendment and in retrospect portrays this effort as "counter-balancing." But this effort was not permitted to the State under the Eighth Amendment. It is unequivocal that Delaware may not attach the "'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example race, religion, or political affiliation of the defendant." Zant v. Stephens, 462, U.S. 862, 885 (1983). This was also not a case where the State sought to logically discredit or rebut a defendant's affirmative contention that he was a member of the NAACP or B'nai B'rith or the N.C.C.J. and supported these organizations in their work over the years, by attempting to discredit the witness by questioning him about his alleged beliefs and inconsistent membership in the Aryan Brotherhood.

In addition, Dawson did nothing unlawful in conjunction with

his membership in the Aryan Brotherhood.[4] But Delaware argues that Dawson's membership in the Aryan Brotherhood is relevant character evidence because it demonstrates that he "lacks counter-balancing redeeming qualities" and that his murder of Marie Kisner "was consistent with his evil character" revealed by such beliefs. Resp Br. at 21. This misdirected argument should be rejected on the record. Not only has the State conceded at all times that the murder committed by the petitioner was not racially or religiously motivated but Delaware's prosecutors also conceded that, while they had information of other groups calling similarly calling themselves the Aryan Brotherhood, they had no knowledge whatsoever concerning the group to which Dawson allegedly belonged:

> PROSECUTOR: ....He can't tell us what Delaware Aryan Brothers believe in except to the extent that Delaware Aryan Brothers sort of per force must have the same general--
>
> THE COURT: What is it again he would testify they would believe in?
>
> PROSECUTOR: That's where my proffer starts to get thin, Your Honor, because I only talked to him for about 15 minutes.

(A-91).

Clearly, the state of Delaware has failed to articulate a valid legal basis to support the conclusion that Dawson's membership in the Aryan Brotherhood could have been relevant to the issue of whether he was to live or die. Therefore, Delaware's claim that the Eighth Amendment was not transgressed by the

---

[4] A man may have as bad a heart as he chooses, if his conduct is within the rules. Oliver Wendell Holmes, The Common Law, 1881.

introduction of Dawson's association with the Aryan Brotherhood, Resp. Br. at 23, must be rejected.

4. The State's Introduction of the Aryan Brotherhood Evidence Clearly Contravened the First Amendment.

Delaware's claim, without ornamentation, is that, among other factors, Dawson can be put to death for constitutionally protected racist beliefs or membership in the Aryan Brotherhood. However, the State of Delaware is completely unable to extend the petitioner's membership in the Aryan Brotherhood beyond the sphere of ideology and it cannot identify a single illegal or immoral act committed by Dawson in connection with his constitutionally protected membership in the Aryan Brotherhood.

Delaware also argues that its prosecutors could exhort members of the petitioner's jury to weigh his membership in the Aryan Brotherhood as an aggravating factor to tilt the balance towards death when deciding its "reasoned moral response to the defendant's background, character and crime". Resp. Br. at 15, (citations omitted). The State of Delaware claims that it may raise a defendant's membership in a racist group as an aggravating factor in a capital sentencing hearing because a state "need not endorse those who hold [racist] views." Resp. Br. at 28. (citing Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978)). Delaware's attempt to draw a distinction between punishing people as a result of beliefs protected by the First Amendment and not endorsing those who hold such views is, however, an outstanding example of Orwellian double-

speak.[5]

To sanction a capital jury's use of a "we don't like him" standard in making its decision is to forget the lessons of Furman v. Georgia, 408 U.S. 238 (1972). Furthermore, although mentioned by the State as authority, Collin squarely rejects Delaware's position in the plainest of terms:

> The result we have reached is dictated by the fundamental proposition that if [First Amendment] rights are to remain vital for all, they must protect, not only those whom society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.

Collin v Smith, 578 F2d at 1210.

Additionally, Delaware advances the argument that "Dawson's First Amendment thrust misses its mark" because Dawson's constitutionally protected membership was not used to establish his eligibility for consideration of the death penalty, ("channeling phase"), but merely to persuade the jury that it should in fact impose the death penalty, ("discretionary" phase). Resp. Br. at 24.[6] Specifically, Delaware argues that "the traditional First

---

[5] In such an environment, state representative David Duke could be denied a place on the Louisiana ballot, not because the Board of Elections wanted to punish him because of his views about or association with the Ku Klux Klan, but because the Board of Elections did not want to endorse either him or his views as a result of their moral response to those views.

[6] In this respect the State of Delaware not only distorts but turns inside out the meaning of Zant v. Stephens, 462 U.S. 862 (1983). If Delaware's interpretation of Zant is correct, the State of Delaware, although it cannot use such evidence to establish statutory aggravating factors, may permissibly argue to a jury that in their discretion, members of the Communist party or individuals who have burned the United States flag are more deserving of death. The State, in its brief in opposition, made no attempt to disclaim the petitioner's observation, Pet. Cert. at 16, f.7, which raised the question of whether the State could permissibly argue that a

Amendment restraints against governmental viewpoint discrimination are not applicable when a capital sentencing jury is called upon to make the 'reasoned moral response' whether an 'individual has lost his moral entitlement to live." Res. Br. at 27-28. Not only has this Court never arrived at such a determination, it has plainly indicated that such a distinction would be unequivocally rejected. Race, religion, or political affiliations are constitutionally irrelevant factors to the sentencing process, no matter what "aggravating" label a State chooses to attach to such factors in its death sentencing process. Zant v. Stephens, 462 U.S. 862, 885 (1983). Delaware further urges that:

> "a capital sentencing scheme need not be so 'value' or 'content' neutral at the stage where the jury is called upon to determine whether to forego retribution and exercise leniency or mercy."

Resp. Br. at 24-25. Delaware's insistence that a state need not be so "value" or "content" neutral at the point where the decision of life versus death is made also plainly distorts this Court's decision in Barclay v. Florida, 463 U.S. 939 (1983). In Barclay, this Court sanctioned a sentencer's consideration of the fact that a black defendant's indiscriminate murder of a white victim was

---

flag burner later convicted of capital murder was more deserving of death because of such "character" evidence. See Texas v. Brown, 491 U.S. ___, 105 L.Ed 342, 109 S.Ct. ___ (1989).

[7] Again, Delaware confuses the issue. A capital jury is not "called upon to determine whether to forego retribution and exercise leniency or mercy." Rather, it is called upon to determine whether death is the only appropriate penalty. The penalty of life imprisonment with possibility of probation, parole or sentence reduction is the most retributive sentence available short of the death penalty. Retribution is never "foregone."

motivated by racial hatred and his desire to instigate a race war. Id. at 949 ("The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder.") However, the Barclay Court did not find that a defendant's general beliefs in racial separatism or racial superiority in and of themselves could serve as an aggravating circumstance as the state of Delaware misleadingly suggests. Res. Br. at 25-26.

In addition, Delaware does not disavow the position articulated by its prosecutor in support of the position that the evidence was admissible:

> What is important for the jury to understand is what he is into. This is his character. His character is he thinks the Aryan Brotherhood is a really neat organization and he believes in the things that they believe in.

(A-85,86) and that some of the literature seized from petitioner's cell "deal[t] with kinds of white supremacy as religion." (A-84). Delaware's designation of the petitioner's membership in the Aryan Brotherhood as an aggravating circumstance, its presentation of that evidence to petitioner's jury and the exhortation by its prosecutor that such membership was a reason to vote to impose the death penalty constituted state action violative of Dawson's First and Eighth Amendment rights.[8]

---

[8] Delaware's continued unwillingness to remain race neutral in some policies may be viewed in an ironic historical context. Nearly forty years ago, Delaware, through its Attorney General, asked for relief in this Court from an order of its own Supreme Court ordering desegregation on equal protection grounds in several racially segregated "separate but equal" unequal school districts. Gebhart v. Belton, Del. Supr., 91 A.2d 137 (1952), modified sub.

The thrust of State of Delaware's arguments, that, so long as a narrowing statutory aggravating factor also exists, the "communal sense of tolerance" and "communal moral voice" permit the jury virtually unlimited discretion to sentence the petitioner pursuant to its "reasoned moral response" based on values in which there is "broad community consensus," Res. Br. at 27-28, is not supported by any authority. Were it so, the State could importune cultural fears of miscegenation, or fears of unorthodox religious sects and peculiar political parties possessed by many jury members, and based on a "communal moral voice," ask the jury to impose death based on those values.

Throughout its arguments, the State ignores the fundamental proposition that a jury's discretion in the capital sentencing process is abused whenever it is exercised for reasons incompatible with the United States Constitution. Furman v. Georgia, 408 U.S. 238 (1972).

Conclusion

Delaware's claim that "one need not look any further than the various opinions in Zant v. Stephens, 462 U.S. 862 (1983) and Barclay v. Florida, 463 U.S. 939 (1983) to turn back [Dawson's] petition", Resp. Br. at 16, must be rejected. Barclay sanctions a

---

nom., Brown v. Board of Education, 347 U.S. 483 (1954). Of course, if Delaware is presently race neutral in its death policy, it would consider, and obviously does not reject in its brief in opposition, that membership in the "Black Hebrews" or other prison racial sects would similarly constitute "character" evidence probative in a death penalty proceeding of whether that individual defendant should die. Cf. United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983).

jury's consideration of racial hatred which itself motivated the murder; in no way does Barclay authorize admission of evidence concerning a defendant's constitutionally protected activity and membership. The clear teaching of Zant is that petitioner's death sentence is constitutionally infirm because the jury was permitted at the sentencing stage "to draw adverse inferences from conduct that is constitutionally protected." Zant, supra at 885.

For these reasons, the petitioner, DAVID DAWSON, prays that this Court grant his petition for a writ of certiorari to review the judgment of the Delaware Supreme Court affirming his sentence of death.

Respectfully submitted,

BERNARD J. O'DONNELL, ESQUIRE
Counsel of Record

BRIAN J. BARTLEY, ESQUIRE

Office of the Public Defender
820 N. French St.
Wilmington, DE 19805
(302) 577-3230

Date: March 25, 1991

IN THE SUPREME COURT OF THE UNITED STATES

DAVID F. DAWSON, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)	No. 90-6704

AFFIDAVIT OF MAILING

STATE OF DELAWARE)
) SS.
COUNTY OF NEW CASTLE)

BE IT REMEMBERED that on this 25th day of March, 1991, personally appeared before me, a Notary Public for the State and County aforesaid, Michell L. D'Arcangelo, a legal Secretary for the Public Defender's Office, of the State of Delaware who being personally known to me, did swear and depose that she caused to be placed in the United State's Mail two copies of Petitioner's Reply To Brief In Opposition to the following attorneys:

Gary A. Myers, Esquire
Department of Justice
1 S. Race Street
P.O. Box 508
Georgetown, Delaware 19947

Michell L. D'Arcangelo
MICHELL L. D'ARCANGELO

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Brian J. Bartley
ATTORNEY-AT-LAW